PUBLIC PROSECUTOR

v.

MOHD. ABDULLAH ANG SWEE KANG

HIGH COURT MALAYA, KUALA LUMPUR
NH CHAN J
[SELANGOR CRIMINAL TRIAL NO. 59-1-86]
15 DECEMBER 1986

CRIMINAL LAW AND PROCEDURE: *Criminal breach of trust - Offence under s. 409 of the Penal Code - Appropriate punishment - Plea of guilty - Whether sentence to be reduced accordingly.*

The accused and his wife owned a one-third equity of MAA Holdings Sdn.Bhd. MAA owned 13.4% of the equity of Malaysia Overseas Investment Corporation (MOIC). The accused was the managing director of MOIC. MAA held 20% of another company known as NARSPRO.

NARSPRO had ordered certain machinery from Taiwan costing US$220,000. They had paid a deposit of US$66,000 and needed to open letters of credit for the balance sum. As NARSPRO did not have the financial means to do so, the accused without the approval of MOIC's Board of Directors got the bankers of MOIC to pay out RM338,808.80 on 9 April 1985.

NARSPRO for whom the money was paid for its benefit paid to MOIC the sum of RM338,808.80 together with bank interest on 2 May 1986.

The accused was charged under s. 409 of the Penal Code. He pleaded guilty.

Held:

[1] In a breach of trust case a Judge ought always to apply the two factors which operate in this kind of case: the retributive factor in order to show the Court's disapproval or abhorrence, on behalf of the community, of this type of criminal conduct; and the deterrent factor so as to discourage likely offenders.

[2] In a breach of trust cases a term of immediate imprisonment is inevitable, save in very exceptional circumstances or where the amount of money obtained is small.

[3] The guidelines laid down in *Reg. v. Barrick* applies in this country but with the additional stipulation or rider in mind - that the length of the terms of the imprisonment recommended in the guidelines be made twice as long. (In any case where a plea of guilty is entered however the Court should give the appropriate discount).

[Accused sentenced to 8 years' imprisonment. In addition a fine of RM100,000; in default a further 6 months' imprisonment.]

Cases referred to:
Reg. v. Davies [1978] 67 Cr. App. R.207
Reg. v. Sargeant [1974] 60 Cr. App. R.74
Reg. v. Barrick [1985] 81 Cr.App. R. 78
Reg. v. Pugh and Rendell [1981] Crim. LR 270
PP v. Khairuddin [1982] 1 MLJ 331
PP v. Muthu Lingam [1986] CLJ (Rep) 603

Legislation referred to:
Penal Code, ss. 406, 407, 408, 409

For the public prosecutor - Mohtar Abdullah (Tan Hock Chuan with him)
For the accused - Jeffrey Fernandez (Dulip Singh with him); M/s. Dulip Singh & Co.

JUDGMENT

NH Chan J:

What is the right sentencing policy for criminal breach of trust? "A good deal depends upon the concept of what is necessary. There are of course the classical considerations relevant to all sentences: retribution, deterrence, prevention and rehabilitation. In our judgement two of those factors operate in a case of this kind." - said Lawton LJ in the Court of Appeal in *Reg. v. Davies* [1978] 67 Cr. App.R. 207, 210. The two factors which operate in this class of case are retribution and deterrence. In *Davies* it was held that where a solicitor in breach of trust uses clients' money to bolster-up other business interests, in considering the appropriate sentence, both the retributive and deterrent elements have to be considered.

The retributive element is an important one in this class of case. "At one time it was fashionable to suggest that retribution ought not to enter into sentencing policy. That opinion I think, is not held as strongly now as it was a few years ago. The reason is manifest: the Courts have to make it clear that crime does not pay and the only way they can do so is by the length of sentences. Sentences show the Court's disapproval, on behalf of the community, of particular types of criminal conduct" - by Lawton LJ in *Davies,* at p. 210. "The Old Testament concept of an eye for an eye and tooth for tooth no longer plays any part in our criminal law. There is, however, another aspect of retribution which is frequently overlooked: it is that society, through the Courts, must show its abhorrence of particular types of crime, and the only way in which the Courts can show this is by the sentences they pass." - by Lawton LJ in *Reg. v. Sargeant* [1974] 60 Cr. App. R. 74, 77.

The next aspect of the matter is the deterrent element. It is said, and rightly said, that when a person is minded to commit criminal breach of trust he is not likely to be deterred by the fact that he may get five years rather than three years or six years rather than four years. "That is right, but what has got to be maintained is this; be they cashiers, milk roundsmen, foremen or solicitors if they are in breach of trust they will be punished and punished very severely ... Therefore it must be made clear that anyone breaking trust must expect a severe sentence." - by Lawton LJ in *Davies* at p. 210. Likely offenders may very well be put off by deterrent sentences. So that as far as deterrence of others is concerned, it is the experience of the Courts that deterrent sentences may very well be of considerable value where crime is premeditated. This is what Lawton LJ said in *Sargeant,* at p. 77:

> There are two aspects of deterrence: deterrence of the offender and deterrence of likely offenders. Experience has shown over the years that deterrence of the offender is not a very useful approach, because those who have their wits about them usually find the closing of prison gates an experience which they do not want again. If they do not learn that lesson, there is likely to be a high degree of recidivism anyway. So far as deterrence of others is concerned, it is the experience of the Courts that deterrent sentences are of little value in respect of offences which are committed on the spur of the moment, either in hot blood or in drink or both. Deterrent sentences may very well be a considerable value where crime is premeditated.

Persons in positions of trust who are thinking of abusing that trust by making away with other people's money may very well be put off by deterrent sentences.

Any Judge who comes to sentence in a breach of trust case ought always to apply to two factors which operate in this kind of case, the retributive factor in order to show the Courts' disapproval or abhorrence, on behalf of the community, of this type of criminal conduct, and the deterrent factor so as to discourage likely offenders.

In breach of trust cases a term of immediate imprisonment is inevitable, save in very exceptional circumstances or where the amount of money obtained is small. The sentencing Court should pass a sufficiently substantial term of imprisonment to mark publicly the gravity of the offence: see *Reg; v. Barrick* [1985] 81 Cr. App. R. 78, at pp. 81, 82. The Court of Appeal in *Reg. v. Pugh and Rendell* [1981] Crim. LR 270, 271, has pointed out that "dishonesty by persons in positions of trust was all too common, and the only way to stop it was by custodial sentences. Offenders in this class of case had ample funds from which to pay fines, and would regard being fined as one of the risks of the business." And in *PP v. Khairuddin* [1982] 1 MLJ 331, 332, Azmi J has this to say:

> The number of people placed in position[s] of trust has been growing steadily and rapidly both in the private and public sectors with corresponding increase in opportunities for such people to make easy money by dishonest means.
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> ... Public interest demands that cases of this nature involving persons in positions of trust, particularly in financial institutions, must be dealt with severely, in the hope that would-be deterred. Until it is understood by such people that the normal punishment for helping themselves to their employers' money is to be sent to prison, there will continue to be officials in commercial and cooperative banks and similar institutions, prepared to pilfer the till.

In *Barrick,* (*supra*) the Lord Chief Justice gave the following guidelines on the proper level of sentence to be imposed in breach of trust cases in the United Kingdom. He said, at p. 82:

> The sum involved is obviously not the only factor to be considered, but it may in many cases provide a useful guide. Where the amounts involved cannot be described as small but are less than £10,000 or thereabouts, terms of imprisonment ranging from the very short up to about 18 months ar appropriate (see for example *Weston* [1980] 2 Cr. App. R. (S) 391). Cases involving sums of between about £10,000 and £50,000 will merit a term of about 2 to 3 years' imprisonment. Where greater sums are involved, for example those over £100,000 then a term of 3½ years to 4½years would be justified (see for example the case of *Strubell* [1982] 4 Cr. App. R. (S) 300).

In *Khairuddin, (supra*) the amount involved on the CBT charge under s. 408 of the Penal Code was RM20,000 and Azmi J substituted a sentence of 18 months' imprisonment for the day's imprisonment imposed at trial in addition to the fine of RM2,000. In *PP v. Muthu Lingam* [1986] CLJ (Rep) 603, the amount involved was RM100,000. A sentence of 3 years' imprisonment was substituted for the 1 day imposed at trial in addition to the fine of RM3,000 for criminal breach of trust under s. 409 Penal Code.

If this Court is to follow the trend set by these two cases *Khairuddin and Muthu Lingam* on the proper sentence to be passed in breach of trust cases which seems, albeit coincidentally, to be in line with the guidelines which have been given in the English case of *Barrick,* then, a term of 3½ to 4½ years would appear to be justified in the present case where the amount involved is RM338,808.80. But then United Kingdom law is not nearly the same as local law in breach of trust cases.

In the United Kingdom, in breach of trust cases there is no proper basis for distinguishing between them upon the offender's occupation. Professional men should expect to be punished as the others: see *Barrick, supra*. On the other hand in this country how an accused person

would have fared would depend on his occupation. Anyone who commits criminal breach of trust can be punished with imprisonment for up to 3 years, or with fine, or with both: s. 406 Penal Code. But if he commits the offence as a carrier, wharfinger or warehouse-keeper acting as such, he can be imprisoned for up to 7 years plus liability to a fine: s. 407. If it is committed by a clerk or servant acting as such he can be imprisoned for up to 7 years plus fine: s. 408. If breaking trust is by a public servant, or by a banker, merchant, factor, broker, attorney or agent acting as such in the way of his business, he can be imprisoned up to a maximum of 20 years plus fine: s. 409.

In this country, in breach of trust cases the gravity of the crime depends on the occupation of the offender. The most serious offence is s. 409 and the punishment for it is also the most severe. That this is so is because, in the eye of the law, no criminal could be in greater breach of trust than a public servant, or a banker, merchant, factor, broker, attorney or agent acting as such.

In *Barrick*, the total amount of the defalcations involved was £9,000 and the maximum sentence for the offences for which he was charged was 10 years. He received concurrent sentences of 2 years which were held, on appeal, to be not excessive. In *Davis*, the total amount involved in the defalcations amounted to £260,000 and the maximum sentence that could be imposed was 7 years. His sentence of 4 years' imprisonment was confirmed on appeal. But in this country for the offence under s. 409 of the Penal Code the maximum sentence is 20 years.

Although ss. 407, 408 and 409 of the Penal Code provide the basis for distinguishing between the sections upon the offender's occupation, and United Kingdom law does not in breach of trust cases, there seems to be some compatibility (s. 409 excepted) with regard to the maximum sentence that could be imposed between the United Kingdom and local legislations. In the light of these considerations it seems to this Court that the *Barrick* guidelines on the proper level of sentence to be imposed are useful to local sentencing Courts for offences under ss. 406, 407 and 408 of the Penal Code as the maximum length of the sentence of imprisonment which could be imposed in those sections is more or less equivalent to the maximum sentence in the United Kingdom provisions.

In the case of a s. 409 offence, however, since the crime is considered by the legislature as very grave criminal conduct, the punishment, in order to fit the crime, is made especially severe - 20 years as the maximum term of imprisonment. The maximum punishment for this offence is twice the length of the maximum of the harshest United Kingdom punishment in breach of trust cases. Nonetheless, the *Barrick* guidelines are still useful but with the additional stipulation or rider in mind - that the length of the terms of imprisonment recommended in the guidelines be made twice as long. In view of these considerations and with the benefit of hindsight, it seems to this Court that the sentence imposed by me in *Muthu Lingam (supra)* to which I have referred in this judgment was too lenient.

I turn now to the instant case.

The accused, Mohammad Abdullah Ang Swee Kang, pleaded guilty to a charge of criminal breach of trust by an agent acting as such. The offence carries a maximum punishment of 20 years' imprisonment plus liability to a fine. The charge reads:

> That you on 9 April 1985 at No.91, Jalan SS21/1A, Damansara Utama, Petaling Jaya, in the State of Selangor, being an agent of Malaysia Overseas Investment Corporation Sdn. Bhd. to wit, the Managing Director and in such capacity entrusted with dominion over certain property, to wit, M$338,808.80, committed criminal breach of trust in respect of the said property and you thereby committed an offence punishable under s. 409 of the Penal Code.

Malaysia Overseas Investment Corporation (MOIC) was incorporated on 28 April 1983. It was the result of a joint venture agreement between nine parties. MOIC is a company formed to "co-operate with each other (the nine investing partners of the joint venture) for the purpose of investing overseas, expanding or furthering Malaysian international trade, and to function as a body for trade and investment purposes." One of the parties to the joint venture was MAA Holdings Sdn. Bhd. (MAA). This company owns 666,670 shares in MOIC which represents 13.4% of the equity of MOIC. The accused and his wife own 163,502 shares in MAA which amount to one-third of the equity of MAA. The accused is a director of MAA at all material times.

Since the formation of MOIC the accused had been its managing director until his resignation on 11 September 1985. As its managing director the accused had full management and financial control of the company. He was entrusted with dominion over money belonging to MOIC including those in the various bank accounts operated by MOIC.

There was also a company known as NARSPRO Sdn. Bhd. (NARSPRO) which is a joint venture company to establish rubber manufacturing factories in the district of Kubang Pasu, Kedah. MAA, of which the accused and his wife have an interest, holds 20% of the equity in NARSPRO.

NARSPRO had ordered certain machinery from Taiwan costing US$220,000. They have paid a deposit of US$66,000 and they needed to open letters of credit for the balance sum. However, NARSPRO did not have the financial means nor credit facilities to do so. The accused then agreed to authorise MOIC's bankers to open letters of credit in the name of MOIC for the benefit of NARSPRO. (According to the accused in his mitigation plea, an approach was made to him for assistance from the joint managing director of NARSPRO, Raja Mohamed at the behest of the Prime Minister).

When the Machinery arrived in Penang on 25 March 1985, NARSPRO did not have the money. But the letters of credit had been opened in the name of MOIC. According to the defence, it was at this crucial time that the accused made the decision to get MOIC to negotiate the letters of credit. On his instruction, a sum of RM338,808.80 was paid out by the bankers of MOIC on 9 April 1985.

The payment was not made for the benefit of MOIC and it was made without the knowledge nor approval of the Board of Directors of MOIC.

NARSPRO, for whom the money was paid for its benefit, had by 2 May 1986 paid to MOIC the sum of RM338,808.80 together with bank interest.

Mr. Fernandez has said that there was no loss suffered by MOIC because it had got its money back. But that is not the point. This is not a view which this Court can accept. The point is that the accused had made use of the money of MOIC as if it was his own. He had used it to assist NARSPRO as to which MOIC had no interests or connections. The Courts have to mark publicly the gravity of the crime and the sooner company directors realise that the funds of their companies are not theirs to spend or disburse as their own the better it is for the economic well-being of the country.

It has also been urged upon this Court that a conviction is a shattering experience for a man of his position and standing in society. His Counsel said that the accused was a man who rose from humble beginnings to great heights in the business world. He had also contributed much to helping others. He has now lost his standing in society and in the business world. All I can say is that he has brought all this on himself.

As was said in *Barrick*, at p.81, a person who commits breach of trust, "will usually, as in this case, be a person of hitherto impeccable character. It is practically certain, again as in this case, that he will never offend again and, in the nature of things, he will never again in his life be able to secure similar employment with all that that means in the shape of disgrace for himself and hardship for himself and also his family." That passage points accurately to the type of case with which the Courts normally are concerned whenever a person is charged with criminal breach of trust. In almost all cases the accused is a first offender. It was also the type of case with which the Court of Appeal were concerned when they gave their guidelines in *Barrick.*

I am also mindful of the fact that the accused had pleaded guilty. In *Barrick,* the Lord Chief Justice has this to say, at p. 82:

> The (prison) terms suggested (in the guidelines) are appropriate where the case is contested. In any case where a plea of guilty is entered however the Court should give the appropriate discount.

I have looked carefully at his mitigation and I have borne in mind all the points Mr. Fernandez has made. After having anxiously considered all matters in the case and after having given the appropriate discount for his plea of guilty I must now pronounce the appropriate sentence. I have to pass a sufficiently substantial term of imprisonment to mark publicly to gravity of the crime. No criminal could be in greater breach of trust than a company director acting as such in the way of his business.

I sentence the accused to eight years' imprisonment plus a fine of RM100,000 in default of which there will be imprisonment for a further 6 months, the sentence to begin with effect from 12 December 1986.

Also found at [1987] 1 CLJ 292